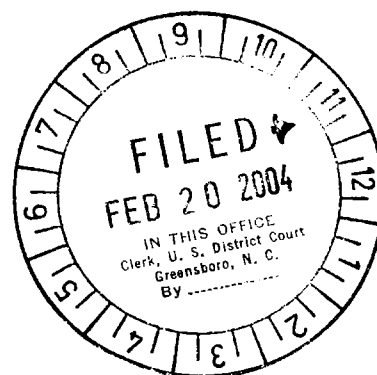


IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GEMINI DRILLING AND	)	
FOUNDATION, LLC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO. 1:03CV00999
	)	
BALFOUR BEATTY CONSTRUCTION,	)	
INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

BULLOCK, District Judge



Defendant Balfour Beatty Construction, Inc. ("Balfour Beatty") has moved to transfer venue to the United States District Court for the Eastern District of North Carolina pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1404(a). Plaintiff Gemini Drilling and Foundation, LLC. ("Gemini") does not oppose the motion. For the following reasons, the court will grant Defendant's motion to transfer this case to the United States District Court for the Eastern District of North Carolina.

## FACTS

Gemini brings this action for an account stated relating to the Smith Creek Parkway construction project in Wilmington, North Carolina. On September 26, 2003, Gemini filed its complaint in the North Carolina General Court of Justice, Superior Court Division, County of Forsyth. Balfour Beatty removed the matter to federal court and now seeks a transfer to the United States District Court for the Eastern District of North Carolina. Gemini does not object to this motion.

## DISCUSSION

The court may transfer an action to another district pursuant to 28 U.S.C. § 1404(a) if three requirements are met: (1) the action originally could have been brought in the transferee court; (2) a transfer serves the convenience of the witnesses and parties; and (3) a transfer serves the interests of justice. See 28 U.S.C. § 1404(a). The first requirement of Section 1404(a) is met if the transferee court has subject matter jurisdiction, proper venue, and personal jurisdiction over the parties. See Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960); Scotland Mem'l Hosp., Inc. v. Integrated Informatics, Inc., 2003 WL 151852, at \*2 (M.D.N.C. Jan. 8, 2003). In this case, subject

matter jurisdiction is satisfied by diversity of citizenship of the parties under 28 U.S.C. § 1332.<sup>1</sup> Venue is proper in the Eastern District of North Carolina because that is the district in which "a substantial part of the events or omissions giving rise to the claim occurred." See 28 U.S.C. § 1391(a). Personal jurisdiction over Balfour Beatty is met if the forum selection clause in the parties' subcontract is enforceable.<sup>2</sup>

Under Fourth Circuit law, forum selection clauses are presumptively enforceable. Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996). However, this presumption is overcome if: (1) the clause was induced by fraud or overreaching; (2) the complaining party will be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; (4) enforcement of the clause would

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<sup>1</sup> Gemini is a North Carolina corporation, and Balfour Beatty is a Delaware corporation with its principal place of business in Georgia. The amount in controversy requirement has been met. (Pl.'s Compl. at 3.)

<sup>2</sup> The forum selection clause provides:

LEGAL FORUM: Any disputes or claims arising out of the Contract, or from a material breach of the Contract, and which is not resolved by the terms and provisions of the Contract, shall be submitted to the court in and where the Project is located or where Contractor's principal place of business is located.

(Br. Supp. Def.'s Mot. Transfer Venue, Ex. A, Smith Creek Parkway Subcontract Agreement, at 5.7.)

contravene a strong public policy of the forum state. Id. (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991), and The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972)). This case implicates none of these concerns. There is no evidence that the forum selection provision in the parties' subcontract is invalid by virtue of fraud or overreaching. Further, litigating this case in the district where the project is sited will not impose "grave unfairness" on either party and may be more convenient than litigating in this district. Finally, because the subcontract states that disputes will be resolved under North Carolina law (Br. Supp. Def.'s Mot. Transfer Venue, Ex. A, Smith Creek Parkway Subcontract Agreement, at 5.6.), transfer to another district within North Carolina will not deprive the plaintiff of a remedy or contravene public policy. Consequently, the forum selection clause is valid, and the first prong of the Section 1404(a) inquiry is fulfilled.

To determine whether transfer is appropriate under the remaining two requirements of Section 1404(a), the court "must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988). Factors pertinent to this analysis include the plaintiff's initial choice of forum; relative ease of access

to sources of proof; availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing and unwilling witnesses; possibility of a view of the premises, if appropriate; enforceability of a judgment; relative advantage and obstacles to a fair trial; other practical problems that make a trial easy, expeditious, or expensive; administrative difficulties of court congestion; local interest in having localized controversies settled at home; appropriateness in having a trial of a diversity case in a forum that is at home with the state law that must govern the action; and avoidance of unnecessary problems with conflicts of laws.

Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. 519, 527

(M.D.N.C. 1996).

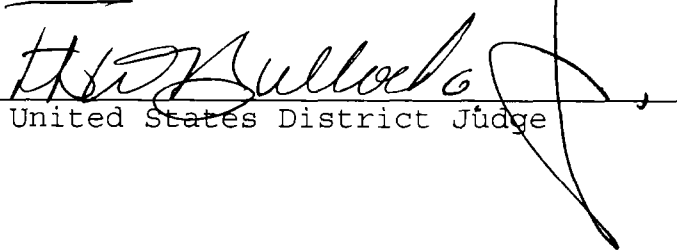
After considering the above factors, the court finds that transfer serves the convenience of the parties and witnesses and the interests of justice. The parties' agreement contains an enforceable forum selection clause designating the Eastern District of North Carolina as the selected forum, and the project site as well as many of the witnesses and relevant documents are located in the Eastern District. (Br. Supp. Def.'s Mot. Transfer Venue, Ex. 1, Aff. of Mark Johnnie, ¶¶ 10, 11.) Gemini does not object to litigating in the Eastern District, and transfer will not hinder judicial integrity or administration of this case. Thus, pursuant to 28 U.S.C. § 1404(a), the court will transfer

this action to the United States District Court for the Eastern District of North Carolina.

#### CONCLUSION

The court will grant Defendant's motion and transfer this case to the Eastern District of North Carolina pursuant to 28 U.S.C. § 1404(a). The Clerk shall forward the record to the United States District Court for the Eastern District of North Carolina.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

  
United States District Judge

February 20, 2004